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In the Supreme Court of the United States

OCTOBER TERM, 1986

METROPOLITAN TRANSPORTATION AUTHORITY AND METRO-NORTH COMMUTER RAILROAD COMPANY, PETITIONERS

v.

INTERSTATE COMMERCE COMMISSION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the order of the Interstate Commerce Commission establishing compensation for the use of petitioners' tracks and facilities by respondent National Railroad Passenger Corporation (Amtrak) for the operation of passenger trains constitutes a "taking" of petitioners' property within the meaning of the Fifth Amendment.

2. Whether Congress constitutionally may provide for the Commission, rather than a court, to establish in the first instance the compensation payable by Amtrak for the use of petitioners' tracks and facilities.

3. Whether the Commission's order, which provides for Amtrak to pay petitioners for all incremental costs attributable to Amtrak's operations plus an additional amount based on the quality of service, furnishes a constitutionally adequate level of compensation.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-25a) is reported at 792 F.2d 287. The decisions of the Interstate Commerce Commission (Pet. App. 26a-33a, 34a-46a, 47a-73a) are not reported.

JURISDICTION

The judgment of the court of appeals was entered on June 4, 1986, and the petition for a writ of certiorari was filed on September 2, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Congress enacted the Rail Passenger Service Act of 1970 (RPSA), 84 Stat. 1327, 45 U.S.C. 501 *et seq.*, in response to the rapid deterioration of intercity rail passenger

service. The Act authorized the creation of National Railroad Passenger Corporation (Amtrak) and provided for the assumption by Amtrak of the intercity passenger service obligations of nearly all of the Nation's railroads. *National Railroad Passenger Corp.* v. *Atchison, T. & S.F. Ry. Co.*, 470 U.S. 451, 454-456 (1985); *Congress of Railway Unions* v. *Hodgson*, 326 F. Supp. 68, 70 (D.D.C. 1971).

Under Section 402(a) of RPSA, 45 U.S.C. 562(a), Amtrak may contract with "railroads" (such as petitioner Metro-North Commuter Railroad Company) and with "regional transportation agencies" (such as petitioner Metropolitan Transportation Authority (MTA)) for the "use of tracks and other facilities" necessary for Amtrak to provide intercity rail passenger service. If the parties cannot agree to the terms for that use, the Interstate Commerce Commission may order the railroad or regional transportation agency to permit Amtrak to use the facilities in return for "just and reasonable" compensation. Section 402(a) provides that in fixing "the amount (if any)" of "compensation in excess of incremental costs," the Commission shall "consider quality of service as a major factor." "Incremental costs," the parties agree, are limited to "avoidable" costs, which are those that would be incurred if the services of Amtrak were eliminated. See Pet. App. 5a-6a, 50a; H.R. Rep. 415, 93d Cong., 1st Sess. 6, 11 (1973).

2. This case is an action for judicial review of the Commission's order under Section 402(a) of RPSA establishing the compensation payable by Amtrak to petitioners for Amtrak's use of tracks and other facilities on the Harlem-Hudson Line, which runs between Poughkeepsie and Grand Central Terminal in New York.

a. Before the passage of RPSA, Penn Central Transportation Company was the owner of the Harlem-Hudson Line and conducted freight, intercity passenger,

and commuter service over the Line. In April 1971, Amtrak assumed Penn Central's obligations to conduct intercity passenger service, and Penn Central thereafter operated intercity passenger trains over the Harlem-Hudson Line for Amtrak's account. On June 1, 1972, Penn Central leased the Harlem-Hudson Line to petitioner MTA for 60 years (with renewal options for an additional 30 years) at a nominal charge. The lease agreement reserved to Penn Central all rights necessary for the operation of its own freight trains and Amtrak's passenger trains over the Line (subject to a trackage charge if the operations exceeded stated levels). The agreement also had the effect of making MTA eligible for substantial federal aid. See 49 U.S.C. App. 1602(a). A second agreement entered into on June 1, 1972 provided for Penn Central to operate commuter rail service over the Harlem-Hudson Line for MTA's account. Pet. App. 6a-7a, 28a; *Consolidated Rail Corp.* v. *Metro-North Commuter R.R. Co.*, 598 F.Supp. 1571, 1575-1576 (Regional Rail Reorg. Ct. 1984) (hereinafter cited as *Conrail*).

b. On April 1, 1976, pursuant to the Final System Plan prepared under the Regional Rail Reorganization Act of 1973[1] and approved by Congress (see 45 U.S.C. 718(d)(1)), the bulk of Penn Central's railroad assets, including its trackage rights over the Harlem-Hudson Line and its responsibility for providing commuter rail service on the Line, were assigned to Consolidated Rail Corporation (Conrail). Also on April 1, 1976, pursuant to the same statute, Conrail assigned to Amtrak certain long-haul passenger train trackage rights in the Northeast Corridor, but that assignment did not include Conrail's trackage rights over the Harlem-Hudson Line, because the Line is not in the Northeast Corridor. Conrail, not Amtrak,

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[1] 87 Stat. 985, 45 U.S.C. 701 *et seq.*; see *Regional Rail Reorganization Act Cases*, 419 U.S. 102, 111-115 (1974).

therefore continued to hold the trackage rights over the Line that Penn Central had reserved when it leased the Line to MTA. Accordingly, in order to enable Amtrak to continue to furnish intercity passenger service over the Line, Amtrak entered into an agreement with Conrail under which Conrail made the tracks and facilities available and operated Amtrak's trains over the Line for Amtrak's account, just as Penn Central had previously done. Pet. App. 7a-8a, 28a-29a; *Conrail*, 598 F. Supp. at 1576-1577. Conrail also provided commuter service over the Line for MTA's account, just as Penn Central had previously done.

c. In the Northeast Rail Service Act of 1981 (NRSA), Pub. L. No. 97-35, tit. XI, 95 Stat. 643 *et seq.*, Congress provided for the transfer of Conrail's commuter rail service responsibilities to entities whose principal purpose is the provision of commuter services. See 45 U.S.C. 1102(2). MTA organized a subsidiary, petitioner Metro-North, to furnish commuter services over the Harlem-Hudson Line. Metro-North commenced operations on January 1, 1983, and Conrail ceased to operate commuter services for MTA on that date. Pet. App. 8a; 45 U.S.C. 744a; *Conrail*, 598 F. Supp. at 1577-1578.

3.a. Because Conrail was no longer to be the railroad with operating responsibilities on the Harlem-Hudson Line after January 1, 1983, Amtrak sought to enter into an agreement with petitioners for the use of the Line after that date. When the parties could not reach agreement, Amtrak requested the Interstate Commerce Commission to set the compensation pursuant to Section 402(a) of RPSA.[2] The Commission first rejected petitioners' con-

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[2] Conrail previously had filed an action in the Special Court established by Section 209(b) of the Regional Rail Reorganization Act of 1973, 45 U.S.C. 719(b), seeking a declaration that the essentially free trackage rights over the Harlem-Hudson and the New Haven Lines that were reserved to Penn Central under the 1972 lease agreement

tention that Section 402(a) violates the Fifth Amendment because it (i) results in a taking of petitioners' property by permitting Amtrak to use their tracks and other facilities and (ii) assigns to the Commission in the first instance, rather than the courts, the responsibility for setting the compensation to be paid by Amtrak. In the Commission's view, it was not clear that Section 402(a) effects a taking, "since Metro-North still has a right (albeit nonexclusive) to use its property" (Pet. App. 40a). But the Commission found petitioners' argument to be without merit in any event, because the courts have sustained the power of Congress to assign to an administrative tribunal the responsibility for ascertaining just compensation (*id.* at 40a-41a).[3]

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with petitioner MTA were still valid, even though Conrail had ceased operating commuter rail services effective January 1, 1983. Amtrak intervened in those proceedings, seeking a declaration that its similar trackage rights over the New Haven Line were still valid. The Special Court held that both Conrail and Amtrak retained those trackage rights. *Conrail*, 598 F. Supp. at 1582. That decision did not apply to Amtrak's service on the Harlem-Hudson Line, because it is not in the Northeast Corridor and Amtrak was not assigned any rights on it by Conrail in 1976. Pet. App. 9a, 29a, 36a.

After Amtrak requested the Commission to set the compensation for use of the Harlem-Hudson Line, petitioners filed a motion in the Special Court to enjoin the Commission proceedings. Petitioners argued that Section 402(a) does not apply to Amtrak's use of their facilities and that Section 402(a) is unconstitutional if it does so apply. The Special Court denied petitioners' motion, concluding that the Commission had jurisdiction under Section 402(a) and that petitioners' constitutional objection was not substantial in light of *Thompson* v. *Texas Mexican Ry.*, 328 U.S. 134, 147-148 (1946). See Pet. App. 137a-141a. In the instant case, the Commission and the court of appeals likewise rejected petitioners' argument that Section 402(a) is inapplicable (Pet. App. 12a-17a, 30a-33a, 37a-40a), and petitioners do not challenge that holding here (see Pet. 10).

[3] The Commission also rejected petitioners' contention that the application of Section 402(a) is unconstitutional under the Tenth Amendment and this Court's decision in *National League of Cities* v.

The Commission then ordered Amtrak to compensate petitioners according to the incremental cost standard in Section 402(a). See Pet. App. 45a-46a, 50a-66a. Under this standard Amtrak—which operates 18 trains per day, as compared with 102 operated by Metro-North (*id.* at 24a)—is responsible for those expenses that would not be incurred by Metro-North if Amtrak's use were eliminated (*id.* at 45a, 50a). Applying principles the Commission had previously developed to implement the incremental cost standard, the Commission allocated to Amtrak its share of expenses for the track and facilities, ticket and report clerks, refuse removal and switching at Grand Central Terminal, electricity, and liability to third parties (*id.* at 54a-66a, 68a-69a). In addition, as authorized by Section 402(a), the Commission provided for further payments by Amtrak of $2.50 per train mile based on quality of service (*id.* at 66a-67a, 71a-73a). This formula could result in additional payments to Metro-North in excess of $1 million annually. Pet. 21 n.26; Amtrak Br. in Opp. 6.

b. The court of appeals sustained the Commission's decision (Pet. App. 1a-25a), rejecting petitioner's constitutional contentions (*id.* at 17a-22a).

First, the court found no constitutional infirmity in the provision in Section 402(a) for the Commission, rather than a court, to prescribe the compensation for Amtrak's

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Usery, 426 U.S. 833 (1976). The Commission explained that "[t]he present case * * * involves a matter traditionally entrusted to the Federal government under the Commerce Clause—the use of a segment of rail line to connect an interstate passenger route"—and that Metro-North's claim of State sovereignty therefore "must give way to the interstate commerce needs of a functioning network of interstate passenger routes." Pet. App. 41a, citing *Transportation Union* v. *Long Island R.R. Co.*, 455 U.S. 678 (1982). The court of appeals, relying on the intervening decision in *Garcia* v. *San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985), likewise rejected petitioners' Tenth Amendment claim (Pet. App. 22a-23a). Petitioners do not renew that claim here.

use of another railroad's facilities. Quoting Judge Friendly's observation for the Special Court when it denied petitioners' motion to enjoin the Commission proceedings (see note 2, *supra*), the court of appeals stated that this constitutional objection " 'does not appear to us to be substantial in light of *Thompson* v. *Texas Mexican Railway Co.*, 328 U.S. 134, 147-148 (1946)' " (Pet. App. 18a, quoting *id.* at 139a-140a). In *Texas Mexican Ry.*, the Court held that the Commission had jurisdiction to establish the terms and conditions for trackage rights, and in the court of appeals' view that case "unquestionably stands for the proposition that the delegation of power to the ICC to set trackage rates, subject to ultimate judicial review, is constitutional" (Pet. App. 19a).

Second, the court of appeals rejected the contention that an order to make facilities available under Section 402(a) results in a "taking" of property (Pet. App. 19a-20a). The court initially noted "the irony of a transit authority that obtains a sixty-plus year lease of railroad property at a nominal rate and that, as a result of that lease, receives substantial aid from the federal government claiming that a federal agency is taking its leased property improperly because the compensation the authority receives is limited to avoidable costs" (*id.* at 19a). In any event, the court observed that since *Munn* v. *Illinois*, 94 U.S. 113 (1876), railroads have been subject to reasonable regulation, and that in this case, "requiring one public utility to give another operative rights over its facilities, subject to an obligation to pay reasonable reimbursement, in order to deliver service to the public * * * fits more into the regulatory rather than the taking mode" (Pet. App. 19a-20a). In holding that the rate regulation in this case does not impermissibly interfere with petitioners' " 'investment backed expectations' " (*id.* at 20a, quoting *Kaiser Aetna* v. *United States*, 444 U.S. 164, 175 (1979)), the

court found it "hard to imagine that when MTA, a public authority, leased the Harlem-Hudson Line at a minimal investment it had any expectation that it could preclude its lessor or those holding rights reserved by the lessor from exercising the reserved trackage rights" (*id.* at 20a).

Third, the court held that reimbursement of avoidable costs satisfies the requirements of the Fifth Amendment even if an order granting trackage rights under Section 402(a) does result in a "taking" of property. The court explained that if MTA receives reimbursement for its avoidable costs, it "will be put in the same position monetarily as it would have occupied if the property had not been taken, and this is precisely the guiding principle of what is just compensation." Pet. App. 20a.[4]

ARGUMENT

The court of appeals correctly rejected petitioners' constitutional challenge to the Interstate Commerce Commission's order establishing compensation for Amtrak's use of the Harlem-Hudson Line on the basis of incremental costs and quality of service. Petitioners leased the Line, subject to reserved rights in Penn Central to run its own freight trains and Amtrak's passenger trains, after Congress enacted Section 402(a) of RPSA, and they therefore had no reasonable investment-backed expectation that they would receive reimbursement under some other formula. Moreover, petitioners lease the Line for a nominal charge and operate commuter services with substantial aid from the Federal Government. There accordingly is no merit to petitioners' contention that their property was unconstitutionally taken by the Commission's order, which leaves them in no worse position—and perhaps in a better posi-

[4] The court of appeals also rejected several non-constitutional challenges by petitioners to the Commission's calculation of the compensation owed by Amtrak (Pet. App. 23a-25a). Petitioners do not renew those challenges here.

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tion—than if Amtrak were not using the Line. The court of appeals' holding is consistent with this Court's decisions regarding the Commission's powers and the nature of trackage rights, and it presents no issue of general importance warranting review by this Court.

1. The central premise of petitioners' submission is that the Commission's order under Section 402(a) results in a "taking" of their property within the meaning of the Fifth Amendment. The court of appeals correctly rejected that contention.

a. Regulation obliging a railroad to make its facilities available for transportation use at reasonable rates does not constitute a "taking." Since *Munn* v. *Illinois*, 94 U.S. 113 (1876), it has been settled that businesses such as railroads are subject to reasonable governmental regulation. The Court stated in *Munn* that "when private property is devoted to a public use, it is subject to public regulation" (*id.* at 130), and that "[s]tatutes regulating the use, or even the price of the use, of private property [do not deprive] an owner of his property without due process of law" (*id.* at 125). Such governmental regulation "may, consistently with the Constitution, limit stringently the return recovered on investment" (*Permian Basin Area Rate Cases*), 390 U.S. 747, 769 (1968)), and such regulation is consistent with the Fifth Amendment if the rates are not confiscatory (*id.* at 770; *St. Joseph Stock Yards Co.* v. *United States*, 298 U.S. 38, 49 (1936)). Petitioners do not and could not contend that the compensation payable by Amtrak under Section 402(a) is confiscatory, because Amtrak is responsible for all costs attributable to its operations.[5]

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[5] Moreover, as petitioners concede (Pet. 13-14 n.14), in addition to the compensation payable under the special formula for calculating the incremental cost to petitioners resulting from Amtrak's use of the tracks (the Speed Factored Gross Ton Miles Formula), Amtrak also agreed to contribute $6 million to the rehabilitation of a portion of the Line. Pet. App. 12a, 57a.

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b. Petitioners nevertheless argue (Pet. 12, 14-15) that Section 402(a) results in a taking because the Commission's order confers upon Amtrak the right to "physically occupy" petitioners' property against their wishes and therefore is indistinguishable from an ordinary exercise of the power of eminent domain. But a common carrier is traditionally obliged by regulation to accept the physical presence of other people and their assets on its property for purposes of transportation. While such regulation could be characterized as permitting a physical invasion of the common carrier's property, it does not follow that every such regulatory measure is a taking, importing into the ratemaking context the quite distinct doctrine and rules of compensation developed under the Court's Fifth Amendment takings cases.

In particular, this Court repeatedly has described the use by one railroad of the tracks and facilities of another in return for a reasonable charge not as a "taking" or acquisition of an interest in property, but as the shared use of property that has been devoted to serving the public interest[6] and therefore as a proper subject of governmental regulation. For example, in *Texas Mexican Ry.*, the Court stressed that a trackage agreement over another railroad's line "created only a personal obligation and did not purport to grant * * * any estate in the property of [the owner]" (328 U.S. at 140). Similarly, in *Union Pacific Ry.* v. *Chicago, R.I. & P. Ry.*, 163 U.S. 564 (1896), the Court stressed that railroad lines traditionally have been "regarded and treated as public highways for the use of all who ha[ve] occasion to run their vehicles thereon" (*id.* at 585), and that a railroad having trackage rights over such a line "had no possession before its trains came on the tracks or after they had run off them; and while its trains were on

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[6] See *Dayton-Goose Creek Ry.* v. *United States*, 263 U.S. 456, 479 (1924); *Penn-Central Merger Cases*, 389 U.S. 486, 510-511 (1968).

the track, its possession was only of the particular part occupied temporarily while running over them" (*id.* at 582). Such a transitory use of a particular segment of track as a train passes over it is far different from the sort of physical occupation of property that could form the basis for a taking claim. The Commission's order in this case does not, for example, grant Amtrak an interest in or control over any of petitioners' facilities or prevent petitioners from exercising such control or using the tracks. The order simply enables Amtrak to use the facilities in the manner in which common carriers typically use the highways of commerce that are dedicated to public service.

Nor does the Commission's order in this case represent a novel exercise of regulatory power. More than fifty years ago, the Court recognized the exclusive jurisdiction of the Commission, under the Transportation Act of 1920, over the terms and conditions of trackage rights agreements. The court noted that the "enormous sums" required for investment in separate rail lines had caused or threatened financial ruin to many railroads and that the "[n]eed for effective regulation in this field had become urgent" (*Transit Commission* v. *United States*, 289 U.S. 121, 127 (1933)). Similarly, in *Pennsylvania Co.* v. *United States*, 236 U.S. 351, 369-372 (1915), the Court held that a Commission order requiring a railroad to receive and transport the cars of another carrier was not a taking of the railroad's property without compensation, in violation of the Fifth Amendment.[7]

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[7] By contrast, *Lehigh & N.E. Ry.* v. *ICC*, 540 F.2d 71, 81-84 (3d Cir. 1976), cert. denied, 429 U.S. 1061 (1977), upon which petitioners rely, involved the actual possession by one railroad of the line of another; yet even in that circumstance, the court found no taking. See also *Gibbons* v. *United States*, 660 F.2d 225, 229 (7th Cir. 1981); *Gibbons* v. *United States*, 660 F.2d 1227, 1238-1239 (7th Cir. 1981).

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c. The distinction between the sort of transitory use of rail facilities at issue here and a concrete, lasting, and exclusive occupation of property that could give rise to a taking claim is reflected in *Loretto* v. *Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982). In *Loretto*, the Court repeatedly stressed that the cable television company's attachment of its equipment to an apartment house resulted in a "permanent physical occupation" of the premises. 458 U.S. at 426, 427, 430, 432, 434, 437, 441. By contrast, Amtrak's operation of trains over the Harlem-Hudson Line results in what the Court in *Loretto* characterized as a "temporary invasion," which does not constitute a taking per se but instead is subject to a balancing test. 458 U.S. at 428, 432-433 n.9, 434; see pages 13-15, *infra*.

This distinction was underscored in *Lorretto* by the Court's quotation of a passage from *St. Louis* v. *Western Union Telegraph Co.*, 148 U.S. 92 (1893), that contrasted a telegraph company's placement of poles on a street with the typical use of the street for transit (458 U.S. at 428-429, quoting 148 U.S. at 98-99 (emphasis omitted)):

> "The ordinary traveler, whether on foot or in a vehicle, passes to and fro along the streets, and his use and occupation thereof are temporary and shifting. The space he occupies one moment he abandons the next to be occupied by any other traveller. . . . But the use made by the telegraph company is, in respect to so much of the space as it occupies with its poles, permanent and exclusive. It as effectually and permanently dispossesses the general public as if it had destroyed that amount of ground."

In this case, Amstrak's nonexclusive right to run trains over the Line gives it no "permanent and exclusive" presence that "dispossesses" petitioners or others who operate over the tracks; it makes only a "temporary and

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shifting" use of the Line, and "[t]he space [it] occupies one moment [it] abandons the next to be occupied by any other [operator]."

Nor does Amtrak's use interfere with any right of petitioners to exclude others from their premises, a factor the Court also found significant in *Loretto*. See 458 U.S. at 433, quoting *Kaiser Aetna*, 444 U.S. at 176, 180. Unlike the private apartment building in *Loretto,* the tracks and related facilities of a railroad are devoted to public service, which includes the obligation to admit others to their use in return for reasonable compensation. Cf. *PruneYard Shopping Center* v. *Robins*, 447 U.S. 74, 82-85 (1980). The absence of any such right to exclude is especially vivid in this case, because the 1972 agreement by which Penn Central leased the tracks to petitioner had expressly reserved trackage rights for Penn Central and Amtrak.

d. The conclusion that the Commission's order does not result in a taking of property is reinforced by a consideration of the three factors upon which this Court has principally relied in determining whether a regulatory measure results in a taking. Those factors are the "character of the governmental action," the "economic impact of the regulation on the claimant," and the "extent to which the regulation has interfered with distinct investment-backed expectations." See, *e.g.*, *Connolly* v. *PBGC*, No. 84-1555 (Feb. 26, 1986), slip op. 13; *Ruckelshaus* v. *Monsanto Co.*, 467 U.S. 986, 1005 (1984); *Penn Central Transportation Co.* v. *New York City*, 438 U.S. 104, 124 (1978).

First, the governmental action is the traditional one of regulating the terms and conditions of trackage arrangements. Such adjustment of the benefits and burdens of economic life to promote the common good does not generally constitute a taking requiring the payment of compensation. *Connolly*, slip op. 13; *Penn Central*, 438 U.S. at 124. Moreover, the provision in Section 402(a) for Amtrak to use the facilities of other railroads on the basis

of incremental costs and quality of service is but one aspect of far broader initiatives supported by the Federal Government to rehabilitate intercity passenger service throughout the Nation and rail service generally in the Northeast region. Other features of the resulting arrangement enabled MTA to obtain a long-term lease of the Harlem-Hudson Line for only a nominal charge and, as petitioners concede (Pet. 27 n.33), to receive significant financial assistance from the Federal Government to rehabilitate and operate trains over that and other lines. See Amtrak Br. in Opp. at 12 n.9 (itemizing federal financial assistance to MTA for capital improvements ($1.6 billion), transition costs ($59 million), and operating expenses ($24.4 million in 1984)). Compare *Penn Central*, 438 U.S. at 137; *Connolly*, slip op. 13-14. Finally, to the extent that the issue is ultimately one of fairness, it should be noted that Amtrak's furnishing of intercity passenger service over the Line accrues to the advantage of the commuters and taxpayers in New York who contribute to petitioners' expenses (see Pet. 27 n.33) and who therefore ultimately would benefit from any increased contribution to those expenses by Amtrak. Compare *Pennsylvania Coal Co.* v. *Mahon*, 260 U.S. 393, 415 (1922).

Second, with respect to adverse economic impact, petitioners incur no out-of-pocket costs by virtue of the Commission's order, because Section 402(a) requires that they be reimbursed for incremental costs attributable to Amtrak's use of the facilities. In fact, petitioners stand to benefit from Amtrak's presence and the Commission's order, because petitioners also are eligible to receive quality-of-service payments in excess of $1 million annually.

Third, the Commission's order does not interfere with any reasonable investment-backed expectation of petitioners. Prior to the time that MTA leased the Harlem-Hudson Line from Penn Central, Congress, in Section

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402(a) of RPSA, had authorized the Commission to order a railroad or regional transportation agency to make tracks and other facilities available to Amtrak on the basis of incremental costs and quality of service. That statutory provision removes any claim by petitioners that the application of Section 402(a) to the Harlem-Hudson Line upset MTA's reasonable expectations. Compare *Ruckelshaus* v. *Monsanto Co.*, 467 U.S. at 1005-1008; *Bowen* v. *Agencies Opposed to Social Security Entrapment*, No. 85-521 (June 19, 1986), slip op. 10-13; *Connolly*, slip op. 15. Moreover, quite aside from Section 402(a), the 1972 lease agreement preserved as a *contractual* matter the right of Penn Central and Amtrak to operate trains over the Line without a trackage charge, which further undermines any claim that MTA expected that it would have a right to exclude Amtrak from the Line. Compare *Kaiser Aetna*, 444 U.S. at 179-180. Nor were any such expectations MTA might have had "investment-backed" to any significant extent, because MTA leased the Line for a nominal charge. And because Amtrak (like Penn Central and Conrail) then operated trains over the Line for the next decade, petitioner Metro-North could have had no contrary expectations when it took over commuter services in 1983.

e. In sum, " 'justice and fairness' "[8] clearly do not require that petitioners receive monetary contributions from Amtrak in excess of incremental costs and quality-of-service payments. The Commission's order in this case therefore does not result in a taking of property. Because petitioners' entire submission rests on the threshold premise that the Commission's order *does* effect a taking (see Pet. 15, 17), the petition for a writ of certiorari should be denied.

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[8] See *Kaiser Aetna*, 444 U.S. at 175, quoting *Penn Central*, 438 U.S. at 124.

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2. Petitioners present two other questions for review, neither of which need be reached if, as we submit above, the Commission's order did not effect a taking of property.

a. First, relying on the statement in *Monongahela Navigation Co.* v. *United States*, 148 U.S. 312, 327 (1938), that "the ascertainment of [just compensation] is a judicial inquiry," petitioners argue (Pet. 15-16) that Congress could not constitutionally assign to the Commission, rather than the courts, the authority to set compensation in the first instance. This contention is without merit. *Monongahela* establishes only that a court is not bound by a congressional attempt to limit the scope of the judicial inquiry; it does not require that an administrative body be altogether excluded from the process of determining just compensation. As the Court explained in the *Regional Rail Reorganization Act Cases*, 419 U.S. at 151 n.39, "*Monongahela* did no more than restate the general principle that the courts, not the legislature, are ultimately entrusted with assuring compliance with constitutional commands."

It follows, contrary to petitioners' contention (Pet. 16), that the Court's subsequent decision in *Texas Mexican Ry.* is fully consistent with *Monongahela.* In *Texas Mexican Ry.*, the Court held that the Interstate Commerce Act "vests in the Commission, not the courts, the power to determine the terms and conditions under which trackage rights may be acquired. The jurisdiction of the Commission is exclusive." 328 U.S. at 147. In so holding, the Court stressed that "[a]ny legal, including constitutional, rights of [the claimant] are protected by the review which Congress has granted the orders of the Commission" (*id.* at 150). As both the court of appeals and the Special Court concluded (Pet. App. 18a, 139a-140a), petitioners' contention that the Commission is constitutionally barred from determining the compensation due in the specific context of trackage rights, subject to judicial review, cannot be

squared with *Texas Mexican Ry.* Moreover, this Court has repeatedly made clear in other contexts that the ascertainment of just compensation need not be assigned to a court in the first instance. See, *e.g.*, *Bauman* v. *Ross*, 167 U.S. 548, 593 (1897); *United States* v. *Commodities Trading Corp.*, 339 U.S. 121, 125 (1950); *United States* v. *Jones*, 109 U.S. 513, 519 (1883).[9]

The court of appeals adhered to the principles of *Monongahela* and *Texas Mexican Ry.* in this case. The court did not give binding effect to a decision of either Congress or the Commission with respect to the amount of compensation due. In addition, petitioners were given a full and fair opportunity to present evidence before the Commission and to raise on judicial review their claims concerning the constitutional adequacy of the compensation. The court of appeals simply rejected petitioners' constitutional objections on the merits.[10]

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[9] The Fifth Amendment provides: "nor shall private property be taken for public use, without just compensation." This language does not prescribe any particular means by which just compensation must be determined. Petitioners' reliance (Pet. 15) on *Crowell* v. *Benson*, 285 U.S. 22 (1932), and *United States* v. *Raddatz*, 447 U.S. 667 (1980), is misplaced. The Court recognized in *Raddatz* that the holding in *Crowell* was "substantially cut back" by its author, Chief Justice Hughes, in *St. Joseph Stock Yards Co.* v. *United States*, 298 U.S. 38 (1936). See 447 U.S. at 683. In *St. Joseph Stock Yards*, the Court made clear that "th[e] judicial duty to exercise an independent judgment does not require or justify disregard of" the ~~original~~ agency determination, but rather "~~may but~~ may be informed and aided by the sifting procedures of an expert legislative agency." See also *Thomas* v. *Union Carbide Agricultural Products Co.*, No. 84-497 (July 1, 1985), slip op. 16-23; *Northern Pipeline Construction Co.* v. *Marathon Pipe Line Co.*, 458 U.S. 50, 69-70 (1982) (opinion of Brennan, J.).

[10] Petitioners do not rely on the Eleventh Circuit's decision in *Florida Power Corp.* v. *FCC*, 772 F. 2d 1537 (1985), which is pending before this Court on direct appeal (No. 85-1658) and is scheduled for oral argument on December 3, 1986. In *Florida Power*, the Eleventh Circuit held unconstitutional the authorization of the Federal Com-

b. Finally, petitioners contend (Pet. 16-27) that the compensation ordered by the Commission was constitutionally inadequate because it was based on avoidable costs. Particularly in the unique circumstances of the Harlem-Hudson Line, that question would not warrant review by this Court even if Amtrak's use of petitioners' facilities did amount to a taking.

At least in these circumstances, compensation based on avoidable costs is constitutionally adequate because petitioners are thereby put in the same position they would have occupied absent the supposed "taking." See *Chicago & N.W. Transportation Co.* v. *United States*, 678 F.2d 665, 669 (7th Cir. 1982). As the court of appeals observed, under *United States* v. *Reynolds*, 397 U.S. 14, 16 (1970),

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munication Commission, in the Pole Attachments Act, 47 U.S.C. 224, to determine the rates a cable television operator must pay to a public utility that has permitted the operator to attach its cables to the latter's utility poles.

There is no occasion to hold the petition in this case pending the Court's decision in *Florida Power*. The Eleventh Circuit's decision was premised on that court's threshold conclusion that there was a "taking" of property, in light of what the court found to be a "permanent physical occupation" within the meaning of *Loretto*. See 772 F.2d at 1542-1544. Here, by contrast, the court of appeals held that there was *not* a taking. For the reasons stated above (see pages 9-15, *supra*), that holding is clearly correct, because Amtrak's use of petitioners' facilities does not resemble the "permanent physical occupation" in *Loretto*, and that holding below does not warrant review by this Court. Accordingly, there is no occasion in this case to reach the additional question presented by *Florida Power*: whether, if there is a taking, an administrative agency may determine the just compensation due, subject to judicial review. This case is in any event distinguishable from *Florida Power* on the latter issue, in view of the holding in *Texas Mexican Ry.* (which is not challenged in *Florida Power*) that the Interstate Commerce Commission has the authority to establish the terms and conditions for the very type of arrangement at issue here – the exercise of trackage rights – and that the track owner's constitutional rights are fully protected by the opportunity for judicial review.

and *United States* v. *Virginia Electric & Power Co.*, 365 U.S. 624, 633 (1961), "this is precisely the guiding principle of what is just compensation" (Pet. App. 20a-21a).

Petitioners nevertheless assert, without authority, that the statutory incremental cost standard is "palpably unfair" (Pet. 17), and that Amtrak should be forced to bear a portion of the costs that petitioners would incur in operating the Line even in the absence of Amtrak. The court of appeals correctly rejected this contention, stating (Pet. App. 21a):

> Perhaps the whole taking argument can be dismissed with the comment that MTA and Metro-North really wish to seek to have Amtrak share with them the overhead costs of "ownership." If the Fifth Amendment required such a sharing, they would be put in a better position by Amtrak's appearance on the scene. True, Amtrak benefits. But if we know one immutable principle in the law of just compensation it is that value to the taker is not to be considered; only loss to the owner is to be valued. *United States* v. *Miller*, 317 U.S. 369, 375 (1943).

Petitioners concede (Pet. 19) that *United States* v. *Miller*, relied upon by the court of appeals, correctly states the general rule. But they seek an exception to that rule, because they believe it is "unfair" in this context. See Pet. 19-23, 27. Contrary to petitioners' contention, the Constitution does not inflexibly require Congress or an agency to base reimbursement for use of facilities or services on fully distributed rather than incremental costs, as long as the railroad experiences no net loss or other "economic injury" (*Kaiser Aetna*, 444 U.S. at 175). Compare *National Railroad Passenger Corp.* v. *Atchison, T. & S.F. Ry.*, 470 U.S. at 476-478.[11]

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[11] Petitioners contend that a more flexible test of just compensation is appropriate when necessary to prevent " 'manifest injustice to

Whatever might be the merits of such a claim in another setting, moreover, petitioners' argument for an exception to the usual rule of just compensation is completely without merit here. Because MTA made only a minimal investment when it leased the Line, petitioners' assertion (Pet. 26) that Amtrak should pay more than its incremental costs in order to prevent a "free ride" by Amtrak and to enable petitioners to realize a return on their investment rings particularly hollow. Furthermore, petitioners in fact have the opportunity to realize more than $1 million annually in excess of incremental costs (a bonus of more than 100%) based on quality of service. Even assuming that "justice and fairness" might require some element of compensation over and above incremental costs, petitioners have not shown that the quality-of-service formula is a constitutionally impermissible basis on which to measure that element. Finally, the notion of what compensation is "just" in the present circumstances cannot ignore other considerations, including the substantial federal aid to MTA and its Metro-North subsidiary. Surely, it is a fair condition to this aid that petitioners make their tracks and other facilities available to Amtrak, which also receives considerable financial assistance from the Federal Treasury, in return for reimbursement based on incremental costs and quality of service.

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owner or public' " (Pet. 19, quoting *United States* v. *Commodities Trading Corp.*, 339 U.S. at 123). However, *Commodities Trading* does not support petitioners' contention that equitable considerations require an increase in compensation here. In *Commodities Trading*, the War Department requisitioned a commodity for which a ceiling price had been established under the Emergency Price Control Act. The Court held that just compensation should be measured by the ceiling price set by regulation, rather than the higher market value that would have existed in the absence of regulation. The claimant's business, like MTA's, was regulated, and it accordingly could expect only the return available under the regulated price.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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